Asiah bte Abdul Manap & Anor v Capital Insurance Bhd

FEDERAL COURT (PULAU PINANG) — CIVIL APPEAL NO 02-11 OF 1996

CHONG SIEW FAI CJ (SABAH & SARAWAK), EDGAR JOSEPH JR AND WAN ADNAN FCJJ

23 JULY 1998

Civil Procedure *— Parties — Death of plaintiff — Plaintiff commenced action in High Court — Plaintiff died when appeal pending in Court of Appeal — Appellant substituted for deceased plaintiff — Whether hearing of appeal could have proceeded without order for substitution made — Whether order made in Court of Appeal was irregularity or nullity*

The deceased plaintiff (the appellant's husband) was involved in a road accident with a taxi. He sued both the owner and the driver of the taxi and judgment was entered against both of them. The taxi was insured under a policy of third party risk insurance with Capital Insurance and despite having been informed of the proceedings against the owner and the driver of the taxi, Capital Insurance neglected and/or refused to pay the judgment sum. The plaintiff commenced this action in the High Court against Capital Insurance for recovery of the judgment sum. The trial judge granted summary judgment against Capital Insurance. Capital Insurance appealed against the decision of the trial judge.

In the Court of Appeal, the deceased plaintiff (respondent) applied for Capital Insurance's notice of appeal to be dismissed and the record of appeal be set aside. However, before the application was heard, the deceased plaintiff died. Consequent upon his death, his wife (the appellant) applied to the Court of Appeal for an order that she be made a party in the cause or matter and that the proceedings be carried on as though she had been substituted for the deceased plaintiff as the respondent in the appeal. The Court of Appeal allowed the appeal and the summary judgment was set aside. Dissatisfied with the decision, the appellant appealed to this court.

The issue to be decided was whether the hearing of the appeal before the Court of Appeal could have proceeded when the plaintiff had died during the pendency of the appeal and when no order for substitution and for leave to carry on the appeal under r 41 of the Rules of the Court of Appeal 1994 had been made. Counsel for the appellant argued that without an order of substitution of the deceased, the Court of Appeal had no jurisdiction to hear the appeal and any order made therein was null and void. In reply, counsel for the respondent submitted that the failure to substitute rendered the proceedings an irregularity and not a nullity.

Held, allowing the appeal:

(1) The retainer of a solicitor terminates upon the death of his client. This principle applies to a plaintiff who dies in the course of an action and no representative of the deceased plaintiff ratifies or renews the retainer of the solicitor acting for the latter. The court, therefore, could not allow the action or proceedings to continue. Further, although there was no personal representative during the appeal before the Court of Appeal in the present case, someone interested could and had to be made a party to represent the estate of the deceased for the purpose of the appeal and a consequential order for leave to carry on the appeal obtained. The omissions rendered the proceedings before the Court of Appeal defective (see pp 368H, 369F and 370H–I).

(2) Rule 41 of the Rules of the Court of Appeal 1994 provides for reconstitution of an appeal in the event of certain changes affecting a party, whether on death or affecting the interest or liability of a party. It does not become abate by reason of death alone. The personal representative or any person interested must apply for a substitution order or an order to carry on the proceedings. In the present case, an application for substitution was made to the Court of Appeal but no order was granted thereunder, resulting in the hearing of the appeal and the grant of the order setting aside the summary judgment in proceedings where a properly constituted respondent was wanting and the appellant's counsel was acting on a retainer that had lapsed on his client's death. When the appellant's counsel submitted at the hearing, there was no properly constituted party on whose behalf he could act and what he did in the Court of Appeal was without any proper mandate or instructions. As such, the proceedings that took place in the Court of Appeal were irregular, and they together with the order made therein on the same day should be set aside (see p 372C–F); *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307 followed.

[Bahasa Malaysia summary

Si mati plaintif (suami perayu) telah terlibat dalam satu kemalangan jalan raya dengan sebuah teksi. Beliau telah mendakwa kedua-dua pemilik dan pemandu teksi tersebut dan penghakiman telah dimasukkan terhadap kedua-dua mereka. Teksi tersebut telah diinsuranskan di bawah satu polisi insurans risiko pihak ketiga dengan Capital Insurance dan sungguhpun telah dimaklumkan mengenai prosiding terhadap pemilik dan pemandu teksi tersebut, Capital Insurance telah mengabaikan dan/atau enggan untuk membayar jumlah penghakiman. Plaintif telah memulakan tindakan ini di Mahkamah Tinggi terhadap Capital Insurance untuk mendapat balik jumlah penghakiman tersebut. Hakim perbicaraan telah memberikan penghakiman terus terhadap Capital Insurance. Capital Insurance telah merayu terhadap keputusan hakim perbicaraan.

Di Mahkamah Rayuan, si mati plaintif (penentang) memohon supaya notis rayuan Capital Insurance dibatalkan dan rekod rayuan diketepikan. Walau bagaimanapun, sebelum permohonan tersebut didengar, si mati plaintif telah meninggal dunia. Disebabkan oleh kematiannya, isteri beliau (perayu) telah memohon kepada Mahkamah Rayuan untuk satu perintah supaya beliau dijadikan satu pihak dalam kausa atau perkara tersebut dan bahawa prosiding tersebut hendaklah dijalankan seolah-olah beliau telah menggantikan plaintif sebagai penentang dalam rayuan tersebut. Mahkamah Rayuan telah membenarkan rayuan tersebut dan penghakiman terus telah diketepikan. Oleh kerana berasa tidak puas hati dengan keputusan tersebut, perayu telah merayu kepada mahkamah ini.

Isu yang hendak diputuskan adalah sama ada pembicaraan rayuan di hadapan Mahkamah Rayuan mungkin boleh diteruskan apabila plaintif meninggal dunia ketika rayuan menanti penyelesaian dan ketika tiada perintah untuk penggantian dan untuk kebenaran bagi meneruskan rayuan tersebut di bawah k 41 Kaedah-Kaedah Mahkamah Tinggi 1994 dibuat. Peguam bagi pihak perayu telah berhujah bahawa tanpa sebarang perintah penggantian si mati, Mahkamah Rayuan tidak mempunyai bidang kuasa untuk mendengar rayuan tersebut dan sebarang perintah yang dibuat di dalamnya adalah batal dan tak sah. Sebagai jawapan, peguam bagi pihak penentang telah berhujah bahawa kegagalan untuk mengganti telah menjadikan prosiding tersebut suatu luar aturan dan bukannya suatu pembatalan.

Diputuskan, membenarkan rayuan:

(1) Upah seseorang peguamcara tamat sebaik sahaja kematian kliennya. Prinsip ini terpakai pada plaintif yang mati ketika perjalanan sesuatu tindakan dan tiada wakil si mati plaintif memperbaiki atau memperbaharui upah peguamcara tersebut yang bertindak bagi pihak yang terkemudian itu. Dengan itu, mahkamah tidak boleh membenarkan tindakan atau prosiding itu untuk berterusan. Selanjutnya, walaupun tiadanya wakil diri ketika rayuan di hadapan Mahkamah Rayuan dalam kes semasa ini, seseorang yang berkepentingan boleh dan haruslah dijadikan satu pihak bagi mewakili harta pusaka si mati bagi tujuan rayuan tersebut dan satu perintah berbangkit diperolehi untuk kebenaran bagi meneruskan rayuan tersebut. Peninggalannya menjadikan prosiding di hadapan Mahkamah Rayuan tidak sempurna (lihat ms 368H, 369F dan 370H–I).

(2) Kaedah 41 Kaedah-Kaedah Mahkamah Rayuan 1994 memperuntukkan penyusunan semula sesuatu rayuan sekiranya terdapat penukaran tertentu yang menjejaskan sesuatu pihak, sama ada di atas kematian atau menjejaskan kepentingan atau tanggungan sesuatu pihak. Ianya tidak berhenti disebabkan oleh kematian sahaja. Wakil diri atau mana-mana orang yang berkepentingan mestilah memohon untuk mendapatkan perintah

penggantian atau satu perintah untuk meneruskan prosiding. Dalam kes semasa, satu permohonan untuk penggantian telah dibuat kepada Mahkamah Rayuan tetapi tiada perintah telah diberikan di bawahnya, yang menyebabkan pembicaraan rayuan tersebut dan pemberian perintah yang mengetepikan penghakiman terus dalam prosiding di mana penentang yang dibentuk dengan sempurnanya tiada dan peguam perayu bertindak atas upah yang telah pun luput dengan kematian kliennya. Apabila peguam perayu berhujah di pembicaraan, tidak terdapat pihak yang dibentuk dengan sempurna bagi pihak siapa beliau boleh bertindak dan apa yang dilakukan olehnya dalam Mahkamah Rayuan adalah tanpa sebarang mandat atau arahan yang sempurna. Oleh yang demikian, prosiding yang berlaku dalam Mahkamah Rayuan adalah di luar aturan dan bersama-sama dengan perintah yang dibuat di situ pada hari yang sama seharusnya diketepikan (lihat ms 372C–F); *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307 diikut.]

Notes

For cases on death of plaintiff, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3265–3266.

Cases referred to

Arnison v Smith (1889) 40 Ch D 567 (refd)
Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd [1916] 2 AC 307 (folld)
Fielding v Rigby [1993] 4 All ER 294 (refd)
Golden Ocean Assurance Ltd and World Mariner Shipping SA v Martin, The Goldean Mariner [1990] 2 Lloyd's Rep 215 (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)
Pool v Pool (1889) 58 LJP 67 (refd)
Shephard, Atkins v Shephard, Re (1889) 43 Ch D 131 (refd)
Whitehead v Lord (1852) 7 Exch 691 (refd)

Legislation referred to

Road Traffic Ordinance 1958 s 96(1)
Road Transport Act 1987 ss 91(4), 96(1)
Rules of the Court of Appeal 1994 rr 4, 18(4)(d), 18(6), 40, 41, 102
Rules of the Federal Court 1995 r 134
Rules of the High Court 1980 O 2 r 1, O 64 r 5(1), (2)
Rules of Supreme Court 1883 O XVII r 4 [UK]

Appeal from: Civil Appeal No B–02–155 of 1995 (Court of Appeal, Kuala Lumpur)

A *Yusof Khan* (*BS Sidhu* and *Sharon Sidhu* with him) (*BS Sidhu & Co*) for the appellant.

VK Lingam (*B Balakrishnan* and *Sri Kumar* with him) (*Azim Ong & Krishnan*) for the respondent.

B **Chong Siew Fai CJ (Sabah & Sarawak)** (delivering judgment of the court): This is an appeal from the decision of the Court of Appeal. The appellants before us are the wife and the son of one Kasim bin Mohd Ali (deceased) who was the plaintiff in an action commenced by him in the High Court at Shah Alam against Capital Insurance Bhd, the respondent herein. Since initially the appellants were not parties in the action, we C consider it desirable to give a brief account of the factual background of the case for a better understanding of the controversies before us. We shall begin with the action in the High Court.

Shah Alam Civil Suit No 23–91–94
D *Kasim bin Mohd Ali v Capital Insurance Bhd*

On 15 February 1986, the deceased plaintiff, Kasim, whilst riding his bicycle, was involved in a road accident with a taxi driven by one Mohd Marudi bin Kasmuri (but owned by one Abdul Rahman bin Derman @ Hj Nor). The deceased plaintiff sued both the owner and the driver of the said E taxi (Shah Alam High Court Civil Suit No 23–129–90). On 20 September 1994, judgment was entered against the owner and the driver totalling RM469,495 being special and general damages with interest at rates from various dates to date of settlement and costs ('the judgment sum').

It was the case of the deceased plaintiff that, at the time of the said F collision, the taxi was insured under a policy of third party risk insurance with the Capital Insurance and that, despite having been informed of the proceedings against the owner and the driver of the taxi, Capital Insurance neglected and/or refused to pay the judgment sum or any part thereof. Accordingly, on 8 November 1994, the plaintiff commenced this action No 23–91–94 in the High Court at Shah Alam against Capital Insurance G under s 96(1) of the Road Traffic Ordinance 1958 (now repealed and replaced by the Road Transport Act 1987) for recovery of the judgment sum. On 9 December 1994, the deceased plaintiff also applied by way of summons in chambers for, inter alia, summary judgment against Capital Insurance in the same terms as the judgment obtained in the earlier suit against the owner and the driver of the said taxi.
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On 9 February 1995, the learned trial judge granted summary judgment against Capital Insurance in the terms as prayed and costs. The learned trial judge was of the view that a letter dated 2 March 1988 from the Registrar and Inspector of Motor Vehicles, Selangor ('RIMV') stating that the said taxi was covered by a policy of third party risk insurance issued by I the defendant, Capital Insurance, for the period commencing from 17 October 1985 to 16 October 1986 was admissible and sufficient proof of the liability of Capital Insurance.

Against the said decision, Capital Insurance appealed.

In the Court of Appeal

On 10 April 1995, the deceased plaintiff (respondent in the Court of Appeal) applied by motion that the Capital Insurance's notice of appeal be dismissed and the record of appeal be set aside on the ground of failure to comply with r 18(4)(d) and (6) of the Rules of the Court of Appeal 1994 and O 64 r 5(1) and (2) of the Rules of the High Court 1980. However, before the application was heard, the respondent/plaintiff died on 12 May 1995. Consequent upon his death, his wife Asiah bte Abdul Manap, applied to the Court of Appeal by motion dated 27 May 1995 for an order that she, being the lawful wife of the deceased respondent/plaintiff, be made a party in the cause or matter and that the proceedings be carried on as though she had been substituted for the deceased respondent/plaintiff as the respondent in the appeal.

It would appear from the judgment of the Court of Appeal dated 12 September 1995 that the appeal proper and the two motions aforesaid were heard together but the motion for substitution was heard first. In the judgment, it was stated that Mr BS Sidhu, learned counsel for the applicant (Asiah bte Abdul Manap), agreed to withdraw the motion upon being told by the court that since the respondent/plaintiff had passed away intestate, the only way substitution could be made was for the widow to first obtain letters of administration relating to the estate of the deceased respondent/plaintiff which had yet to be obtained. The motion for substitution was withdrawn.

As regards the motion to dismiss the notice of appeal and the appeal record, the Court of Appeal chose not to make any order thereon but directed Mr BS Sidhu to raise the matters complained of by way of preliminary objection at the hearing of the main appeal. Briefly, the complaint was that there had been a failure on the part of the appellant, Capital Insurance, to comply with r 18(4)(d) of the Rules of the Court of Appeal 1994 in that the order appealed against dated 9 February 1995 had not been included in the record of appeal (as opposed to the judgment of the learned trial judge which was included). The notice of appeal and the record of appeal were accordingly, so it was argued, bad in law. The Court of Appeal overruled the objection, holding that since the said r 18(4)(d) made reference to a judgment, decree or order, and since a copy of the judgment appealed against was included in the appeal record, the appeal had been properly brought.

The Court of Appeal then proceeded to hear the appeal on its merits and allowed it with costs. The summary judgment was set aside and the appellant, Capital Insurance, was granted unconditional leave to defend the action. The judgment sum which had already been paid to the solicitors for the deceased respondent/plaintiff together with the interest accrued thereon were ordered to be refunded to the solicitors for the appellant, Capital Insurance. Briefly, the Court of Appeal held that there were two triable issues: (1) that the letter dated 2 March 1988 from RIMV was no proof that a certificate of insurance had been delivered to the insured pursuant to s 91(4) of the Road Transport Act 1987 thereby imposing

upon the appellant, Capital Insurance, the duty under s 196(1) of the said 1987 Act to satisfy the judgment obtained by the deceased respondent/plaintiff against the insured of Capital Insurance; and (2) that the appellant, Capital Insurance, had alleged that the letter from RIMV was a forgery, an allegation seemingly substantiated by a letter dated 27 May 1991 from the Motor Insurers Bureau of West Malaysia.

Dissatisfied with the said decision, the applicant, Asiah bte Abdul Manap, now joined by her son, Ahmad bin Kasim, appealed to the Federal Court after obtaining leave to appeal and an order for their substitution as appellants. The Federal Court also directed the judgment sum and the taxed costs be deposited with the Federal Court registry pending the outcome of this appeal. That is how now the two applicants become the appellants before us in this appeal.

The appeal in the Federal Court

In this appeal, a point of practical importance called for consideration. It arose in this manner. As stated earlier, Asiah (one of the present appellants) who was the sole applicant in the Court of Appeal was not granted an order of substitution, the court being of the view that a substitution order could only be granted after Asiah had obtained letters of administration in respect of the estate of her deceased plaintiff-husband. Asiah's application for substitution was accordingly withdrawn, and the Court of Appeal proceeded with the hearing of the appeal in which Mr BS Sidhu purportedly acted and argued for the deceased respondent in the Court of Appeal. The appeal ended in the manner and with the result as indicated earlier ie the summary judgment was set aside and Capital Insurance was granted unconditional leave to defend the action.

The question for decision was: could the hearing of the appeal before the Court of Appeal have proceeded when the plaintiff Kasim had died during the pendency of the appeal and when no order for substitution and for leave to carry on the appeal under r 41 of the Rules of the Court of Appeal 1994 had been made? If no, then what is the effect of this on the proceedings and the judgment of the Court of Appeal?

The arguments before the Federal Court

For the appellants, Mr Yusof Khan (appearing together with Mr BS Sidhu) contended that if there was no substitution after the death of a party to an action, the court had no jurisdiction to hear the appeal and any order made thereunder would be null and void. Reference was made to rr 40 and 41 of the Rules of the Court of Appeal 1994.

Dato' VK Lingam for the respondent, Capital Insurance, drawing our attention to the judgment of the Court of Appeal which stated that Mr BS Sidhu 'readily' agreed to withdraw the application for substitution, argued that by reason thereof the defect of non-substitution, if any, was an irregularity which had been waived upon Mr BS Sidhu withdrawing the application and taking part in arguing the appeal resulting in the decision

of the Court of Appeal stated earlier. That being so, he submitted, there was no prejudice to the estate of the deceased.

In reply, Mr BS Sidhu explained that the withdrawal of the application for substitution was prompted by the Court of Appeal which indicated that the application was unnecessary and that it (the court) had jurisdiction to hear the appeal. He reiterated that it was under those circumstances and in deference to the Court of Appeal that he withdrew the application.

From the judgment of the Court of Appeal, it is clear that the court had indicated to Mr BS Sidhu that the widow-applicant, Asiah, could only apply to be substituted after obtaining letters of administration relating to her deceased-husband's estate. In this regard, the Court of Appeal, in our opinion, had adopted too rigid a test having regard to r 41 of the Rules of the Court of Appeal 1994 which confers upon it a wide discretion to order an appeal to continue between the remaining parties and any person not already a party, or to continue by existing parties in different capacities if this becomes necessary or desirable by reason of death or marriage or bankruptcy or any other event occuring after the commencement of the appeal.

Mr Yusof Khan argued that without an order of substitution of the deceased respondent, the Court of Appeal had no jurisdiction to hear the appeal and any order made therein was, therefore, null and void. He further submitted that, with the death of Kasim bin Mohd Ali as the respondent and in the absence of an order of substitution, Mr BS Sidhu had no mandate to act and argue the appeal before the Court of Appeal, Mr BS Sidhu's retainer as solicitor for the deceased respondent, Kasim, having terminated with the death of Kasim.

In reply, Dato' VK Lingam for Capital Insurance, relying on *Fielding v Rigby* [1993] 4 All ER 294, submitted that the failure to substitute rendered the proceedings an irregularity and not a nullity. He further contended that since Mr BS Sidhu withdrew the application for substitution and participated in arguing the appeal before the Court of Appeal, the irregularity in the proceedings had been waived.

The question posed may be considered in two aspects:

Solicitor's authority to act upon client's death

In normal circumstances, the retainer of a solicitor terminates upon the death of his client. Thus in *Pool v Pool* (1889) 58 LJP 67, it was held that the retainer of the solicitors ceased on the death of their client with the result that the costs incurred after the client's death was disallowed. See also *Whitehead v Lord* (1852) 7 Exch 691 which, though decided on the limitation of claim relating to a solicitor's bill of costs, accepted the basis that a solicitor's retainer determined by the death of the client.

In *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, the plaintiff company was incorporated in England, but all its shareholders but one and all its directors were German residents in Germany. During the war between England and Germany, it commenced

an action for payment of a trade debt. The action was commenced by the solicitors of the company on the instructions of the company's secretary who was born in Germany but had become a naturalized British subject and resided in England. On an application for summary judgment, the defendants contended that the company was an alien enemy company and payment of the debt would be a trading with the enemy, and that the action was commenced without the authority of the company. The master gave leave to the plaintiff company to sign final judgment and his order was affirmed by the judge in chambers and by the Court of Appeal. However, on further appeal, the House of Lords reversed the decision holding, inter alia, that the action was commenced without authority and ought to be struck out as irregular. Lord Parker of Waddington, after expressing that the directors being German residents in Germany and therefore the King's enemies, neither they nor the secretary had the power to authorize solicitors to institute the action, made the following observation, which is pertinent to our present case (at p 337):

> It follows that this action was instituted without authority from the company, and in my opinion the court having notice of the fact should have refused relief. It is true that a question whether the plaintiff's solicitor has or has not been validly retained is in general brought before the court by motion to which the solicitor is made a party. But when the court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed. It clearly would not do so in the case of an infant plaintiff, and I can see no difference in principle between the case of an infant and the case of a company which has no directors or other officers capable of giving instructions for the institution of legal proceedings.

Of course, Lord Parker was talking about incapability of giving a retainer and alluded to the case of an infant. But the principle, in our opinion, applies to a plaintiff who dies in the course of an action and no representative of the deceased plaintiff ratifies or renews the retainer of the solicitor acting for the latter. The court, being apprised of the situation, could not allow the action or proceedings to continue.

Substitution on death of sole appellant

By r 40 of the Rules of the Court of Appeal 1994, the appeal in the Court of Appeal did not abate by reason alone of the death of the respondent/plaintiff, Kasim. The material part of r 41 thereof provides:

> Where by reason of ... death ... occurring after the commencement of an appeal, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the appeal, it becomes necessary or desirable that any person not already a party should be made a party, ... an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court, upon an allegation of such change, or transmission of interest or liability, or of any such person interested having come into existence.

An order made under the said r 41 is generally known as an order to carry on, and such an order will be made if 'it becomes necessary or desirable' that a person not already a party should be made a party. The following passage in para 220 of 37 *Halsbury's Laws of England* (4th Ed) is pertinent. It reads:

> ... where a sole plaintiff or a sole defendant dies or becomes bankrupt, the action cannot continue unless and until an order is duly obtained from the court to carry on the proceedings.
>
> In other words, unless and until a new party is added.

In *Re Shephard, Atkins v Shephard* (1889) 43 Ch D 131, Shephard was entitled to certain freehold property subject to a mortgage. Shortly before his death, a judgment creditor applied for a receiver over the property by way of equitable execution. The application was adjourned, and in the meantime Shephard died. Two days after his death, an order for a receiver was made without reviving the action or bringing the heir-at-law before the court. The Court of Appeal held that the order was ineffectual, it having been made after the death of Shephard and in the absence of any person to represent his estate.

In *Arnison v Smith* (1889) 40 Ch D 567, several plaintiffs sued for damages, based on separate causes of action. Before the trial, two of the plaintiffs died but the plaintiffs' solicitor was unaware of their deaths until after the trial had commenced. No application was made to put off the trial which ended in the dismissal of the plaintiffs' action. The executors of the deceased plaintiffs applied under O XVII r 4 [of the UK Rules of Supreme Court 1883] for an order to carry on the action against the defendants. The application was refused. On appeal, the refusal was affirmed. In his judgment, Cotton LJ made the following observations which we consider pertinent to our present case (at p 569):

> Unfortunately, through the solicitor for the plaintiffs not being made acquainted with the death of these plaintiffs, he did not ask the judge, as he might have done, to allow the trial to stand over to enable the personal representatives of the deceased plaintiffs to be made parties.

And further (at p 571):

> We have no doubt that the plea of res judicata could not be set up against the appellants in a fresh action. The deceased plaintiffs were not parties at the time of trial, and there is no judgment against them.

Cotton LJ spoke of substitution of personal representatives. Although there was no personal representative during the appeal before the Court of Appeal in our present case, someone interested could and had to be made a party to represent the estate of the deceased, Kasim, for the purpose of the appeal and a consequential order for leave to carry on the appeal obtained. The omissions render the proceedings before the Court of Appeal defective.

Nullity or irregularity

The question remains whether such a defect renders the proceedings a mere irregularity or a nullity. Learned counsel for the respondent, Capital Insurance, referred to O 2 r 1 of the Rules of the High Court 1980 (on the effect of non-compliance of rules) which he said was applicable by virtue of r 4 of the Rules of the Court of Appeal 1994. Reference was also made to *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 and *Golden Ocean Assurance Ltd and World Mariner Shipping SA v Martin, The Goldean Mariner* [1990] 2 Lloyd's Rep 215 which turned on the construction and application of the said O 2 r 1 or its equivalent in the English Rules of the Supreme Court.

Order 2 r 1 of the Rules of the High Court 1980 reads:

> Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

and r 4 of the Rules of the Court of Appeal reads:

> Where no other provision is made by any written law or by these Rules, the procedure and practice in the Rules of the High Court 1980 shall mutatis mutandis apply.

However, in our opinion, reliance need not be placed on the said O 2 r 1 in view of the provision of r 102 of the Rules of the Court of Appeal 1994, which is in pari materia with r 134 of the Rules of the Federal Court 1995 and which reads:

> Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.

This rule has substantially the same effect as O 2 r 1 of the Rules of Supreme Court (Revision) 1962 (English) which had been revoked. It must also be noted that the above r 102 and O 2 r 1(1) of the Rules of the High Court 1980 are substantially different. Whereas under the said O 2 r 1(1), non-compliance with the rules 'shall be' treated as an irregularity and 'shall not' nullify the proceedings, the said r 102 provides that non-compliance with any of the rules shall not render any proceedings void unless the court or a judge shall so direct but that they may be set aside wholly or in part as being irregular or amended or otherwise dealt with as the court shall think fit. Thus under the said r 102 of the Rules of the Court of Appeal 1994, the distinction between nullity and irregularity is preserved. Dependent upon the decisions of the court or a judge, a non-

compliance may render the proceedings a nullity (in which case the court or the judge has no discretion but to set them aside) or a non-compliance may render the proceedings merely irregular (in which case they remain valid and the court or the judge has a discretion to set them aside either wholly or in part or amend or otherwise deal with them as thought fit). A

We note that this court granted leave to appeal on the specific question as to whether the order of the Court of Appeal dated 25 July 1995 should be set aside since it was made after the deceased Kasim had died and no order of substitution or to carry on the proceedings under r 41 of the Rules of the Court of Appeal 1994 had been given. The said rule 41 provides for reconstitution of an appeal in the event of certain changes affecting a party eg death or affecting the interest or liability of a party. Where an appellant (or a respondent) dies, the appeal does not, by that reason alone, become abate (r 40). The proper thing to do at that stage would be for the personal representative, if any, or any person interested to apply under r 41 for a substitution order or an order to carry on the proceedings. In our present case, an application for substitution was made to the Court of Appeal but no order was granted thereunder, resulting in the hearing of the appeal and the grant of the order dated 25 July 1995 in proceedings in which not only a properly constituted respondent was wanting but also Mr BS Sidhu purportedly acting on a retainer that had lapsed on his client's death. The fact that Mr BS Sidhu was given the liberty to submit at the hearing is, to our mind, irrelevant because when he did so, there was no properly constituted party on whose behalf he could act and that what he did in the Court of Appeal was without any proper mandate or instructions. B C D E

On the particular facts and circumstances of this case, and following *Daimler Co Ltd v Continental Tyre And Rubber Co (Great Britain) Ltd*, we are of the view that the proceedings that took place in the Court of Appeal on 25 July 1995 are irregular, and that they together with the order made therein on the same day should be set aside. F

This appeal is accordingly allowed with costs here and in the Court of Appeal to the estate of the deceased Kasim. All that part of the proceedings before the Court of Appeal on 25 July 1995 connected with and leading to the making of the order dated 25 July 1995 as well as the said order are hereby set aside. Since Kasim died on 12 May 1995 ie after the appeal in the Court of Appeal was brought by notice dated 10 February 1995, the appeal had not abated. We order that the appeal be re-heard on its merits by a differently constituted panel of the Court of Appeal with the present appellants before us as the respondents in place of the deceased Kasim (if the present appellants so desire) or an application for an appropriate substitution order be made. The deposit is refunded to the appellant. G H

Appeal allowed.

Reported by David Lai I